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SENATE BILL 560

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

INTRODUCED BY

Cisco McSorley

AN ACT

RELATING TO AGRICULTURE; ENACTING THE FARMER PROTECTION ACT;
IMPOSING LIABILITY; ESTABLISHING DEFENSES; REQUIRING REPORTS;
PROHIBITING CERTAIN CROPS; PROVIDING AN INSPECTION AND SAMPLING
PROTOCOL; PROVIDING PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the
"Farmer Protection Act".

Section 2. DEFINITIONS.--As used in the Farmer Protection
Act:

A. "department" means the New Mexico department of
agriculture;

B. "director" means the director of the department
or the director's designee;

C. "DNA" means deoxyribonucleic acid;

1 D. "farmer" means the person responsible for
2 planting a crop, managing the crop and harvesting the crop from
3 land on which a breach of contract or patent infringement is
4 alleged to have occurred;

5 E. "genetically engineered plant" means a plant or
6 any plant part or material, including seeds and pollen, in
7 which the genetic material has been changed through modern
8 biotechnology in a way that does not occur naturally by
9 multiplication or natural recombination;

10 F. "manufacturer" means a person that develops or
11 creates a genetically engineered plant for field trials or for
12 commercial purposes, but does not include a person that is a
13 farmer;

14 G. "modern biotechnology" means the application of
15 in vitro nucleic acid techniques, fusion of cells, including
16 protoplast fusion, or hybridization techniques that overcome
17 natural physiological, reproductive or recombination barriers
18 and that are not techniques used in traditional breeding and
19 selection, including the following:

20 (1) recombinant DNA;

21 (2) direct injection of nucleic acid into
22 cells or organelles; and

23 (3) recombinant DNA techniques that use vector
24 systems and techniques involving the direct introduction into
25 the organism of hereditary materials prepared outside the

1 organism, such as microinjection, macroinjection,
2 chemoporation, electroporation, microencapsulation and liposome
3 fusion;

4 H. "open field production" means the planting,
5 growing, propagation or cultivation of any genetically
6 engineered plant outside an enclosed structure, such as a
7 greenhouse, indoor laboratory or other self-contained
8 production system;

9 I. "pharmaceutical crop" means a seed or plant that
10 is genetically engineered to produce compounds for which
11 commercial use requires approval from the following:

12 (1) the federal food and drug administration
13 center for biologics evaluation and research;

14 (2) the federal food and drug administration
15 center for drug evaluation and research;

16 (3) the federal food and drug administration
17 center for veterinary medicine; or

18 (4) the United States department of
19 agriculture center for veterinary biologics;

20 J. "seed" means agricultural seed or vegetable seed
21 used to grow a commercial agricultural or a commercial
22 vegetable crop;

23 K. "seed contract" means a written contract between
24 a seed supplier and a farmer that a farmer must sign to obtain
25 the seed or the right to plant the seed; and

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1 L. "seed supplier" means a person engaged in
2 commercial production, manufacture or supply of seed or
3 technology genetically engineered into seed.

4 Section 3. MANUFACTURER LIABILITY--DEFENSES--JOINT
5 LIABILITY--WAIVER OF LIABILITY.--

6 A. The release by a manufacturer, directly or
7 through its licensees or agents, of a genetically engineered
8 plant shall constitute a private nuisance for which the
9 manufacturer shall be liable if the following conditions are
10 met:

11 (1) the release causes the presence of the
12 plant within the property owned or occupied by a person for
13 whom the plant presence was not intended and with whom the
14 manufacturer has not entered into a seed contract or a license,
15 and thereby constitutes an unreasonable interference with the
16 use and enjoyment of that person's property; and

17 (2) the release results in damages in any
18 calendar year that exceed five hundred dollars (\$500), thereby
19 constituting substantial interference with the use and
20 enjoyment of the person's property.

21 B. Defenses at law or equity available in a private
22 nuisance action apply to actions brought pursuant to this
23 section, except it shall not be a defense to an action based on
24 the liability set forth in Subsection A of this section that
25 genetically engineered plants are in common or general use in

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1 the geographic region in which the property on which the
2 nuisance occurs are located, nor shall the person owning or
3 occupying the property have a duty to establish buffer zones,
4 segregation protocols or otherwise initiate measures to protect
5 specifically against the potential release of genetically
6 engineered plants onto that person's property.

7 C. A person who is not in breach of a seed contract
8 regarding the purchase or use of a genetically engineered plant
9 and that unknowingly comes into possession of a genetically
10 engineered plant or that uses a genetically engineered plant as
11 a result of natural reproduction, cross-pollination, seed
12 mixing or other commingling or unintended presence or other
13 contamination shall not be liable for any damages, attorney
14 fees or costs caused by the possession or use of that
15 genetically engineered plant.

16 D. A manufacturer shall have a defense to liability
17 for an action based on the liability set forth in Subsection A
18 of this section if the court finds that all of the following
19 conditions are met:

20 (1) the property from which the genetically
21 engineered plant was released can be determined;

22 (2) the owner of the property from which the
23 genetically engineered plant was released, or the owner's
24 agent, signed a seed contract with the manufacturer for the
25 genetically engineered plant and received a training manual

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1 from the manufacturer;

2 (3) the damages would not have occurred had
3 the property owner or the property owner's agent followed the
4 terms of the manufacturer's seed contract and training manual;
5 and

6 (4) the property owner or the property owner's
7 agent willfully or with gross negligence contaminated the
8 plaintiff's property, products or facilities.

9 E. A person found to have willfully or with gross
10 negligence contaminated the plaintiff's property, products or
11 facilities shall be liable for damages in lieu of, and to the
12 same extent as, a manufacturer.

13 F. A prevailing plaintiff in an action under this
14 section may recover damages as are recoverable at common law in
15 an action for private nuisance, reasonable attorney fees and
16 other litigation expenses and costs, including expert witness
17 fees.

18 G. The liability created by this section shall not
19 be waived or otherwise avoided by contract or other means.

20 H. A cause of action arising pursuant to this
21 section shall be in addition to and not in lieu of existing
22 actions at law and equity; provided, however, there shall be
23 only one recovery of any specific damages as defined in this
24 section.

25 Section 4. GENETICALLY MODIFIED PLANT DATABASE--REPORTING

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1 DUTIES--PENALTIES.--

2 A. Not less than thirty days prior to the open
3 field production of a genetically engineered plant, a person
4 intending to undertake that production shall notify the
5 director. Notice to the director shall be provided on a form
6 made available by the department. The department shall make
7 every reasonable effort to reduce the burden of submitting the
8 notice, including making the form available and allowing it to
9 be submitted by hard copy and in an electronic format.

10 B. The notice required pursuant to Subsection A of
11 this section shall include the following information regarding
12 the open field production of a genetically engineered plant:

- 13 (1) proposed date of open field production;
14 (2) proposed location and number of acres;
15 (3) the kind, variety, type and lot number, as
16 those terms are defined in Part 201 of Title 7 of the Code of
17 Federal Regulations, of a seed or plant;
18 (4) trait or traits for which the plant is
19 genetically engineered; and
20 (5) any additional information requested by
21 the director.

22 C. The department shall include in an annual report
23 to the legislature information collected during the year
24 pursuant to Subsection B of this section on the number of acres
25 of open field production of genetically engineered plants, the

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1 types of crops produced and the genetic traits of those crops.
2 Information shall be presented as a countywide aggregate.

3 D. The director may levy a civil penalty against
4 any person who violates the reporting requirements set forth in
5 Subsections A and B of this section or any rules adopted
6 pursuant to those subsections in an amount not less than five
7 hundred dollars (\$500) nor more than five thousand dollars
8 (\$5,000) for each violation. The amount of the penalty
9 assessed for each violation shall be based upon the nature of
10 the violation, the seriousness of the effect of the violation
11 upon the effectuation of the purposes and provisions of the
12 Farmer Protection Act, the violator's history of previous
13 violations and the impact of the penalty on the violator,
14 including the deterrent effect on future violations. For a
15 first offense, in lieu of a civil penalty as set forth in this
16 subsection, the director may issue a notice of violation.
17 Following a third or subsequent violation, the violator shall
18 be restricted from planting in New Mexico for a period of
19 twelve months.

20 Section 5. PROHIBITED ACTIONS--INVESTIGATIONS.--

21 A. The production within New Mexico of a
22 pharmaceutical crop that meets both of the following conditions
23 is prohibited:

24 (1) the pharmaceutical crop is produced by
25 means of open field production; and

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1 (2) the pharmaceutical crop is of a plant
2 species that is commonly produced for use as food for humans or
3 animals.

4 B. The department shall investigate suspected
5 violations of Subsection A of this section based upon a
6 reasonable belief that the subject of the investigation is not
7 in compliance with that subsection.

8 C. The director may levy a civil penalty against
9 any person who violates Subsection A of this section or any
10 rules adopted pursuant to that subsection, in an amount not
11 less than one thousand dollars (\$1,000) nor more than ten
12 thousand dollars (\$10,000) for each violation. The amount of
13 the penalty assessed for each violation shall be based upon the
14 nature of the violation, the seriousness of the effect of the
15 violation upon the effectuation of the purposes and provisions
16 of the Farmer Protection Act, the violator's history of
17 previous violations and the impact of the penalty on the
18 violator, including the deterrent effect on future violations.
19 Following a third or subsequent violation, the violator shall
20 be restricted from planting in New Mexico for a period of
21 twelve months.

22 Section 6. INSPECTIONS.--

23 A. This section and Sections 7 through 9 of the
24 Farmer Protection Act apply to the inspection of seed and the
25 crop growing from seed by a seed supplier pursuant to the seed

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1 supplier's rights pursuant to a seed contract.

2 B. A seed contract shall not give or be interpreted
3 to give a seed supplier or an agent of a seed supplier the
4 right to enter real property owned or occupied by the farmer to
5 acquire samples of the crop grown from the seed or any other
6 plant growing on that real property. A seed supplier of
7 genetically engineered plant seed may only enter upon real
8 property farmed by another person for the purpose of obtaining
9 crop samples if both of the following conditions are met:

10 (1) the seed supplier notifies the farmer and
11 the director of the seed supplier's desire to enter onto the
12 real property and of the purpose the requested entry and
13 requests written permission from the farmer or the farmer's
14 agent to enter upon the farmer's real property; and

15 (2) the seed supplier obtains the written
16 permission of the farmer to enter upon the real property of the
17 farmer; the farmer shall grant or deny the request of the seed
18 supplier within a reasonable period of time.

19 C. If a seed supplier or a farmer requests the
20 director to participate in or conduct the collection of samples
21 or any other aspect of the sampling or analysis process, the
22 director shall designate an employee of the department or enter
23 into an agreement with another person to participate in or
24 conduct the specified activity.

25 Section 7. SAMPLING PROTOCOL.--

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1 A. The seed supplier shall reasonably cooperate
2 with a farmer and the director or their agents in the course of
3 the activities set forth in this section.

4 B. The seed supplier shall permit the farmer and
5 the director or their agents to accompany the seed supplier or
6 the seed supplier's agent while samples are taken. An employee
7 of the department shall oversee the collection of samples. If
8 the director or an agent of the director accompanies the seed
9 supplier on the real property to take samples under this
10 section, the seed supplier shall reimburse the reasonable costs
11 incurred by the director or the director's agent, as determined
12 by the director, in connection with such activity.

13 C. Plant material samples shall be acquired in a
14 manner that is agreed upon by the parties involved. In the
15 event that an agreement cannot be reached, the manner for
16 sample acquisition shall be prescribed by the director. The
17 samples may only be taken from a standing crop, from
18 representative standing plants in the field or from crops
19 remaining in the field after harvest. Samples shall be taken
20 by department personnel. The department may select another
21 entity to collect samples if all parties agree.

22 D. A seed supplier shall take no more samples than
23 those deemed by the director to be reasonably necessary. An
24 equal number of samples shall remain in the custody of the
25 director or the farmer for future comparison and verification

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1 purposes.

2 E. All samples taken shall be placed in containers
3 and labeled as to the date, time and location from which they
4 were taken, and the labels shall be signed by the farmer or
5 farmer's agent, the person who took the samples and the
6 director or director's agent.

7 F. Within sixty days from the date the samples are
8 taken, an independent laboratory shall conduct all tests on the
9 samples.

10 G. The parties shall mutually agree upon the
11 laboratory and the methods used for the analysis of samples.
12 If the laboratory or methods cannot be agreed upon, an
13 independent third party agricultural mediator shall make the
14 final determination of the laboratory and methods to be
15 utilized. The seed supplier shall pay the reasonable costs
16 incurred by the need for mediation. The results of all tests
17 on the seeds shall be reported by the testing laboratory to the
18 director.

19 H. Any plant material remaining after analysis is
20 complete shall be retained by the laboratory or the department
21 in an appropriate manner.

22 I. The results of testing shall be sent by
23 registered letter to the seed supplier and the farmer within
24 thirty days after the results are reported from the testing
25 laboratory to the director.

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1 Section 8. DENIAL OF PERMISSION TO INSPECT--NOTICE OF
2 SUITS.--

3 A. If a farmer denies permission for a seed
4 supplier to enter upon the farmer's real property for an
5 inspection pursuant to Section 6 of the Farmer Protection Act,
6 the seed supplier may petition the district court for the
7 county in which the real property is located for an order
8 granting permission to enter upon the farmer's real property.
9 If the court issues such an order, the order shall require that
10 the sampling protocol set forth in Section 7 of the Farmer
11 Protection Act be implemented. A court order shall not
12 interrupt or interfere with normal farming practices, including
13 harvest and tillage.

14 B. The parties may participate in mediation at any
15 time. The mediation shall be conducted by a mediator jointly
16 selected by the parties. If the parties cannot agree on a
17 mediator, the mediation shall be conducted by an independent
18 agricultural mediation service.

19 C. If a seed supplier files suit against a farmer,
20 the seed supplier shall provide simultaneous written notice of
21 the suit to the director. The director shall keep a file of
22 all notices of suits received pursuant to this section.

23 Section 9. RIGHT OF ACTION FOR VIOLATIONS--DAMAGES--
24 ATTORNEY FEES AND COSTS--CHOICE OF LAW--JURISDICTION--VENUE.--

25 A. A farmer has a right of action against a seed

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1 supplier if the seed supplier or an agent of the seed supplier
2 violates the provisions of the Farmer Protection Act.

3 B. If a farmer prevails in an action filed pursuant
4 to this section, the farmer is entitled to recover from the
5 seed supplier the following:

6 (1) actual damages proven by the farmer
7 resulting from the seed supplier's violation of the Farmer
8 Protection Act; and

9 (2) the farmer's reasonable attorney fees and
10 other litigation costs, including expert witness fees, incurred
11 in connection with the action.

12 C. A seed contract authorizing the use of a
13 genetically engineered plant in New Mexico is governed by the
14 law of New Mexico. New Mexico law shall govern any dispute
15 relating to or arising out of the use of a genetically
16 engineered plant in New Mexico, notwithstanding any contrary
17 choice of law contractual provision. Any provision in a
18 contract purporting to waive or preclude the application of New
19 Mexico law and to choose the laws of another jurisdiction to
20 govern the contract, or to choose a forum for adjudication of
21 disputes arising out of the contract that would not otherwise
22 have jurisdiction over the parties to the contract, is void and
23 unenforceable.

24 D. The proper venue for an action pursuant to the
25 Farmer Protection Act is the district court in the county in

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1 which the damage occurred. Any contractual provision
2 purporting to waive or preclude New Mexico as the proper venue
3 is void and unenforceable.

4 E. Any provision in a contract purporting to waive
5 or preclude the application of New Mexico law and to choose the
6 laws of another jurisdiction to govern the contract, or to
7 choose a forum for adjudication of disputes arising out of the
8 contract that would not otherwise have jurisdiction over the
9 parties to the contract, is void and unenforceable.

10 Section 10. SEVERABILITY.--If any part or application of
11 the Farmer Protection Act is held invalid, the remainder or its
12 application to other situations or persons shall not be
13 affected.